

**Bank Pertanian Malaysia v
Mohd Gazzali bin Mohd Ismail**

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24-732-93

ZALEHA ZAHARI JC
6 NOVEMBER 1995

Land Law — Charge — Order for sale — Whether there exists cause to the contrary — Application for proceeds of sale to be paid in respect of principal and full arrears of interest up to date of actual payment — Whether should be allowed — National Land Code 1965 s 256

Limitation — Charge — Recovery of sum secured by charge — Whether accrued interest to be considered as part of principal sum — Application for order for sale and for proceeds of sale to be paid out to settle outstanding principal and interest — Whether action time-barred — When cause of action arose — Whether notice of demand for payment necessary — Limitation Act s 21(1) & (5)

The plaintiff applied for an order for sale pursuant to s 256 of the National Land Code 1965 ('the NLC 1965') of a piece of land charged by the defendant to the plaintiff as security for a housing loan granted. The plaintiff also applied that proceeds of sale of the said land by public auction be paid out to the plaintiff to settle the sums outstanding in respect of the principal as well as towards full arrears of interest up to the date of actual payment. Since the defendant had resigned from the plaintiff effective 31 July 1983, cl 4 of the charge annexure was invoked which stipulated that the defendant was under an obligation to settle all outstanding sums due should the defendant leave the employment of the plaintiff. On 31 July 1985, the plaintiff issued a notice to the defendant that the rate of interest applicable on the loan was 12% effective three months from the date of the said letter and demanded payment of the loan. The defendant however maintained his silence and continued to default in making payment towards the sums outstanding in respect of both principal and interest. Despite subsequent demands, the defendant continued to default. The plaintiff then proceeded to file this originating summons on 2 August 1993 for an order for sale of the charged property by way of public auction to recover the sums outstanding. Counsel for the defendant contended that the right of the plaintiff was limited to the recovery of the principal sum because the right to recover arrears of interest had been extinguished after the expiry of the six-year limitation period in accordance with s 21(5) of the Limitation Act 1953 ('the LA 1953'). The plaintiff argued that interest was to be treated as part of the principal sum which was subject to a 12-year limitation period under s 21(1) of the LA 1953. The issue was whether the application of the plaintiff that the proceeds of the sale be paid out to the plaintiff towards the recovery of arrears of interest was time-barred pursuant to s 21 of the LA 1953.

A **Held**, allowing the application:

(1) Where there is a relationship between banker and customer and where there is an express term of the loan which provides that money then due or thereafter becomes due is to be made on demand, that means exactly what it says. As between customer and banker, it seems impossible to assume that the bank is entitled to sue on the very day of default or on the occurrence of the specified event without giving the customer a reasonable time to pay (see p 702D-E).

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(2) On the facts of the case, it was an express term of the contract that a demand be issued. Such an 'on demand' provision of the charge made a demand an absolute necessity and time therefore did not run against the plaintiff until a demand was made and repayment had been refused (see p 703A).

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(3) There were provisions in the charge and charge annexure whereby arrears of interest had to be treated as part of the principal sum of money secured by the charge and interest should not be deemed to become due before the right to receive the principal sum of money had accrued or was deemed to have accrued. Section 21(5) proviso (b) of the LA 1953 therefore applied and the limitation period applicable was 12 years and not six years (see p 703E).

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(4) Since time was computed from 31 July 1985 (the date of issuance of the notice of demand) and the originating summons was filed on 2 August 1993, there was only a lapse of eight years. The right of the plaintiff to recover the arrears of interest therefore had not been extinguished as it had been commenced within 12 years (see p 703F).

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(5) The defendant had not shown any reason, whether in law or equity, why the court ought not to make an order for sale as prayed for by the plaintiff in accordance with s 256 of the NLC 1965 (see p 703G).

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[Bahasa Malaysia summary]

Plaintif telah memohon untuk satu perintah jualan mengikut s 256 Kanun Tanah Negara 1965 ('KTN 1965') untuk sebidang tanah yang telah digadaikan oleh defendan kepada plaintiff sebagai cagaran bagi suatu pinjaman perumahan yang telah diberikan. Plaintiff juga memohon agar hasil jualan tanah tersebut melalui lelongan awam dibayar kepada plaintiff bagi menjelaskan jumlah pokok yang belum dibayar, serta untuk menjelaskan pembayaran keseluruhan tunggakan faedah pinjaman tersebut sehingga tarikh bayaran sebenar. Oleh kerana defendan telah meletak jawatan daripada perkhidmatan plaintiff bermula dari 31 Julai 1983, maka fasal 4 lampiran kepada gadaian tersebut telah dipakai oleh plaintiff yang mana ia mengkehendaki agar defendan menjelaskan kesemua jumlah yang belum dijelaskan

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sekiranya defendan meninggalkan perkhidmatan plaintif. Pada 31 A
 Julai 1985, plaintif telah mengisukan satu notis kepada defendan
 memberitahu bahawa bermula tiga bulan dari tarikh notis tersebut,
 kadar faedah bagi pinjaman tersebut ialah 12% dan menuntut bayaran
 pinjaman itu. Bagaimanapun, defendan masih lagi berdiam diri dan B
 terus ingkar dalam pembayaran jumlah yang perlu dijelaskan serta
 faedah yang tertunggak. Tidak kira tuntutan yang terkemudian,
 defendan terus ingkar. Plaintif seterusnya memfailkan saman pemula
 ini pada 2 Ogos 1993 untuk suatu perintah jualan ke atas tanah
 gadaian tersebut melalui lelongan awam untuk mendapatkan balik
 jumlah yang belum dijelaskan. Peguambela defendan berhujah bahawa
 hak plaintif terhadap mendapat balik jumlah pokok kerana hak C
 untuk mendapat balik tunggakan faedah telah lupus setelah tamatnya
 tempoh hadmasa enam tahun mengikut s 21(5) Akta Hadmasa 1953
 ('Akta 1953 itu'). Plaintif menegaskan bahawa faedah patut disifatkan
 sebagai sebahagian daripada jumlah pokok yang tertakluk kepada
 tempoh hadmasa 12 tahun di bawah s 21(1) Akta 1953 itu. Isunya D
 adalah sama ada permohonan plaintif agar hasil jualan tersebut dibayar
 kepada plaintif sebagai pembayaran bagi jumlah faedah tertunggak
 dihalang oleh tempoh masa mengikut s 21 Akta 1953 itu.

Diputuskan, membenarkan permohonan:

- (1) Bilamana terdapat jalinan hubungan antara bank dan pelanggan E
 serta bila terdapatnya satu terma nyata di dalam pinjaman yang
 mensyaratkan bahawa jumlah yang belum dijelaskan perlu dibayar
 bila dituntut, maka itulah yang mesti dilakukan. Di antara
 pelanggan dan bank, adalah mustahil untuk menganggap bahawa
 pihak bank mempunyai hak untuk menyaman terus bila bayaran F
 gagal dibuat ataupun bila terjadi sesuatu perkara spesifik yang
 dinyatakan di dalam perjanjian yang membenarkan tuntutan
 dibuat tanpa memberi masa yang munasabah bagi pelanggan
 membuat bayaran (lihat ms 702D-E).
- (2) Menurut fakta-fakta kes ini, adalah suatu terma yang nyata bahawa G
 tuntutan mestilah diisukan. Peruntukan 'on demand' tersebut
 menjadikan tuntutan sebagai satu keperluan mutlak dan oleh itu,
 tempoh masa tidak berjalan terhadap plaintif sehinggalah tuntutan
 dibuat dan pembayaran balik tidak dilakukan (lihat ms 703A).
- (3) Terdapat peruntukan-peruntukan di dalam gadaian serta lampiran H
 gadaian yang mana jumlah faedah yang tertunggak haruslah
 dianggap sebagai sebahagian daripada jumlah pokok yang dijamin
 oleh gadaian tersebut dan faedah tidak boleh dianggap sebagai
 perlu dibayar sebelum hak untuk mendapatkan jumlah pokok
 telah terakru atau dianggap telah terakru. Maka s 21(5) proviso
 (b) Akta 1953 itu terpakai dan tempoh hadmasa adalah 12 tahun I
 dan bukannya enam tahun (lihat ms 703E).
- (4) Oleh kerana masa dikira dari 31 Julai 1985 (tarikh notis tuntutan
 diisukan) dan saman pemula difailkan pada 2 Ogos 1993, maka

- A selang masa hanyalah lapan tahun. Oleh itu hak plaintif untuk mendapatkan jumlah faedah tertunggak tidak terhapus kerana tindakan dimulakan dalam masa 12 tahun (lihat ms 703F).
- (5) Defendan tidak menunjukkan sebarang sebab, sama ada di dalam undang-undang atau ekuiti, mengapa mahkamah tidak patut memberikan satu perintah jualan seperti yang dipohon oleh plaintif
- B mengikut s 256 KTN 1965 (lihat ms 703G).]

Notes

- C For cases on the existence of cause to the contrary in an application for an order for sale, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1495–1500.

Cases referred to

- D *N Joachimson (a firm name) v Swiss Bank Corp* [1921] 3 KB 110
Nadefinco Ltd v Kevin Corp Sdn Bhd [1978] 2 MLJ 59
Sim Siok Eng v Kong Ming Bank Bhd [1980] 2 MLJ 21

Legislation referred to

- E Limitation Act 1953 ss 21(1), (5)
 National Land Code 1965 s 256

Mohd Fariz bin Othman (Ariff & Co) for the plaintiff.

Sharizen bte Che Mohd Kassim (Yacob & Rakan-Rakan) for the defendant.

- F **Zaleha Zahari JC:** By this originating summons, Bank Pertanian Malaysia, ('the plaintiff') applied for an order for sale, pursuant to s 256 of the National Land Code 1965 ('the NLC 1965'), of land known as HS(D) 12340 No PT 32400, Mukim of Kuala Lumpur ('the said land') which had been charged by Mohd Gazzali bin Mohd Ismail ('the defendant') as security for a housing loan granted by the plaintiff to the defendant.
- G By these proceedings the plaintiff also applied for the proceeds of sale of the said land by public auction to be paid out to the plaintiff to settle the sums outstanding in respect of the principal as well as towards full arrears of interest up to the date of actual payment.
- H The issue that calls for determination in this case is whether the application of the plaintiff that the proceeds of sale be paid out to the plaintiff towards recovery of arrears of interest was time-barred pursuant to s 21(5) of the Limitation Act 1953 ('the LA 1953'). This calls for consideration of not only the relevant statutory provisions but also the true construction of the intention of the parties as expressed in or to be implied from the charge documents executed. The chronological sequence of events, material terms of the charge and the rival arguments presented
- I before me are as follows.

The charge (exh A1 annexed to the affidavit of Mohamed Salleh bin Selamat affirmed on 3 July 1993 filed in support of the application) dated

14 September 1982 was registered at the land registry on 15 October 1982 vide Perserahan No 19949/82 Jilid 278 Folio 39. A

The charge document executed in Form 16A of the NLC 1965 is in the following terms:

Kanun Tanah Negara
BORANG 16A
(SEKSYEN 242)
GADAIAN

B

(Untuk menjamin pembayaran wang pokok)

Saya, Mohd Gazzali bin Mohd Ismail (K/P No 4562382) yang beralamat di d/a Bank Pertanian Malaysia, No 3 Jalan Bertam, Kepala Batas, Province Wellesley, tuanpunya tanah yang tersebut dalam jadual di bawah ini: C

Bagi maksud menjamin:

- (a) pembayaran balik pinjaman sebanyak RM138,152, yang dengan ini saya mengaku telah terima, kepada pemegang gadai yang tersebut namanya di bawah ini, beserta faedah;
- (b) xxxxx
- (c) xxxxx

D

Dengan ini menggadaikan tanah tersebut untuk membayar kepadanya wang tersebut itu berserta faedah atasnya mengikut peruntukan-peruntukan yang dilampirkan di sini.

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Bertarikh 14 September 1982.

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.....
(Tandatangan oleh atau
bagi pihak penggadai)

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By the charge annexure the defendant, inter alia, agreed as follows:

- 4 The balance from time to time due by the chargor to the chargee on the said account shall be payable by the chargor on demand but no demand shall be made by the chargee pursuant to this clause unless default be made by the chargor in payment of any one or more of the said instalments and other payments hereby agreed to be made at the times and in the manner herein mentioned ... or shall leave the employment of the chargee
- 5 Until a demand is made pursuant to cl 4 hereof the chargor shall pay to the chargee the principal sum together with interest thereon at the rate specified in cl 10(a) hereof by Three Hundred (300) monthly instalments of Malaysian Ringgit Seven Hundred and Twenty Nine and Sen Twenty Two (RM729.22) each or instalments of such other amount as shall be determined under the provisions of cll 9 or 11 hereof to the chargee until the whole balance of the said account is paid by the chargor to the chargee in full.
- 6 The first instalment payment referred to in cl 5 hereof shall commence on the last day of the month next following the date on which 95% of the loan shall have been disbursed or 18 months from the date of this charge

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A whichever is earlier and each subsequent instalment shall be paid on the first day of each succeeding month thereafter.

...

...

B 10 (a) Interest payable on all moneys secured by this charge shall be paid at the ruling rate which expression shall mean interest at the rate of four percent (4%) per annum or at such other rate as the chargee acting in accordance with the provisions of this charge may require the chargor to pay.

C (b) It is hereby agreed by the chargee that the chargor shall not be required to pay interest on the loan or any part thereof during the period of (18) eighteen months from the date of first disbursement or until 95% of the loan shall have been disbursed whichever is earlier.

D (c) No part of any payment made by the chargor shall be treated as a repayment of principal until all interest due or deemed to be due or accrued has been paid.

E 11 The chargee may from time to time by a notice in writing of its intention so to do increase or reduce the ruling rate of interest payable hereunder and in regard thereto the following provision shall apply and have effect:

F (i) The ruling rate shall not be increased above the appropriate current rate of interest as hereinafter defined.

G (ii) Any increase or decrease in the ruling rate shall take effect from the end of three (3) months after the date on which the said notice is served on the chargor and the increased or reduced interest shall thereafter be calculated and paid as hereinbefore provided.

H (iii) In lieu of the monthly instalments prescribed by cl 5 hereof the chargor shall as from the expiry of the said notice pay such increased or reduced monthly instalments as shall be appropriate having regard to the alteration effected in the rate of interest payable.

I (iv) ...

G 20 Any notice required or authorized by this charge or by statute to be given or served on the chargor shall be in writing and shall be sufficiently served if served in any manner in which a notice may be served under the NLC 1965.

That the housing loan was granted by the plaintiff and received by the defendant is not in issue. Vide para 2 of the defendant's affidavit-in-reply affirmed on 2 April 1994 (encl 14) the defendant had expressly admitted that he had received the principal sum of RM138,152 from the plaintiff.

In relation to the commencement date of the defendant's obligation to pay the loan and interest, by Mohamed Salleh bin Selamat's affidavit affirmed on 5 July 1994 (encl 19), it was the plaintiff's case that: ;

I (1) applying cl 6 of the charge annexure, as 95% of the loan was disbursed on 21 November 1983 whilst the charge was registered on 5 October 1992, the defendant was therefore obliged to effect payment of the first instalment on 12 December 1983;

- (2) applying cl 10(b) of the charge annexure, as the first disbursement of RM31,699 made vide cheque number BBMB 026105 was effected by the plaintiff on 2 July 1982 whilst 95% of the loan was disbursed on 21 November 1983, the commencement date to pay interest was therefore 21 November 1983. A

On the facts of this case it is also not in issue that the defendant had resigned from the employment of the plaintiff effective 31 July 1983. It would appear that consequent upon the defendant's resignation from the employment of the plaintiff, the plaintiff invoked cl 4 of the charge annexure which stipulated that the defendant was under an obligation to settle all outstanding sums due should the defendant leave the employment of the plaintiff. According to exh A3 (encl 19), arising from the defendant's failure to settle the outstanding sums in respect of the said loan two months and three weeks after the defendant's resignation, the plaintiff issued a notice of demand dated 21 October 1983 in the following terms: B C

Bil Kami: BPMP 231/2/118

21 Oktober 1983 D

En Mohd Gazzali bin Mohd Ismail
Bank Islam Malaysia Bhd,
Jalan Raja Laut,
Kuala Lumpur. E

Tuan,

PER: TUNTUTAN BAYARAN PINJAMAN PERUMAHAN — RM138,152 F

Dengan segala hormatnya kami merujuk kepada perkara di atas, bahawa tuan telah meletakkan jawatan dari perkhidmatan bank berkuatkuasa pada 31 Julai 1983 dan masih mempunyai baki pinjaman perumahan berjumlah RM138,152 (pokok). G

Berdasarkan syarat-syarat pinjaman perumahan di dalam Pekeliling Perbendaharaan Bil 5 Tahun 1980, para 12.2, jika sekiranya tuan ingin membatalkan pinjaman yang telah diberi (diluluskan), oleh kerana sesuatu sebab, sebagai contoh meninggalkan perkhidmatan bank, tuan dikehendaki menyelesaikan semua pembayaran yang telah dibuat oleh bank kepada pihak pemaju, termasuk faedah di atas amaun yang telah dikeluarkan sebelum tuan meninggalkan perkhidmatan. H

Oleh kerana tuan gagal berbuat demikian tuan dikehendaki menyelesaikan baki tersebut dalam tempoh 14 hari (dua minggu) dari tarikh surat ini. Jika tuan gagal berbuat demikian di dalam tempoh yang ditetapkan kami akan terus menyalurkan perkara ini kepada pengurus jabatan undang-undang untuk diambil tindakan undang-undang terhadap tuan, tanpa merujuk kepada tuan lagi. I

Sekian dimaklumkan. Terima kasih.

A Yang benar,
BANK PERTANIAN MALAYSIA
tt
(MAHMUD MOHD TAIB)
b/p Pengurus Besar.

B According to the plaintiff no payment was effected within the 14 days stipulated in this notice of demand.

C It would appear that there was a lapse of about one year and eight months before the plaintiff took any subsequent action. On 31 July 1985 the plaintiff issued a notice to the defendant (exh A4 (encl 19)) that the rate of interest applicable on the loan was 12% effective three months from date of the said letter. According to the plaintiff there was no response to this notice of increment of interest. The defendant maintained his silence and continued to default in making payment towards the sums outstanding in respect of both, principal or interest.

D Seven years and ten months lapsed before the plaintiff moved again. By then, according to the plaintiff, the sums outstanding as of 28 February 1993 in respect of principal and interest had mounted to RM270,583.73. On 5 May 1993 the plaintiff proceeded to issue a letter and a notice in Form 16D of the NLC 1965 (exh A3 (encl 2)) to demand the sums
E outstanding as at 28 February 1993. It was only upon the defendant's failure to respond to the statutory notice issued that the plaintiff proceeded to file this originating summons for an order for the sale of the charged property by way of public auction to recover the sums outstanding in respect of principal as well as arrears of interest.

F It was argued on behalf of the plaintiff that the originating summons was filed within time; that the time frame applicable in this case was 12 years as prescribed by s 21(1) of the LA 1953; that by reason of cl 4 of the charge annexure (which prescribed resignation as one of the circumstances upon which the whole sum together with interest has to be paid) and cl 5 (requiring a demand to be made for repayment), the period of 12 years was
G to be computed from 31 July 1985 (ie the date of issue of notice of demand).

H Counsel for the plaintiff submitted that on the facts of this case the property subject to the charge comprises of not only the original sum lent but also the interest. The charge executed expressly states that the security was for payment of not only RM138,152 but also for 'faedah' (interest). According to him it was therefore a term of the charge that arrears of interest shall be treated as part of the principal sum of money secured by the charge. It was his further submission that from the documents executed it was clear that interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to
I have accrued; that interest shall not be treated for limitation purposes as becoming due before the right to recover the principal sum of money has accrued or is treated as having accrued. For this proposition the plaintiff sought to rely on cl 10(c) of the charge annexure which provided that no

part of any payment by the chargor shall be treated as a repayment of principal until all interest due or deemed to be due or accrued has been paid. In these circumstances he urged the court to hold that proviso (b) of s 21(5) of the LA 1953 applies. A

Numerous affidavits have been filed by the plaintiff showing the sums outstanding as of various dates, ie at the time of filing of the originating summons as well as at the respective hearing dates of the originating summons. According to the last affidavit filed by the plaintiff, ie that of Mohamed Salleh bin Selamat affirmed on 3 July 1995 (encl 33), the plaintiff had set out in detail how the total sums outstanding, representing principal and interest amounting to RM309,323.23 had been computed. B C

To sum up the plaintiff's case, interest was to be treated as part of the principal sum. Time runs from 31 July 1985. As this originating summons was filed by the plaintiff on 2 August 1993, the plaintiff's claim was not time-barred as it was filed well within the 12 years prescribed by s 21(1) of the LA 1953. All procedural provisions have been duly complied with. The plaintiff accordingly prayed for an order in terms of the application. D

As earlier stated, the defendant had expressly admitted that he had not paid even a single cent to date towards the said loan. Notwithstanding the non-payment however, the defendant was of the view that the plaintiff was not entitled to exercise their statutory right for an order for sale by reason of the right to recover arrears of interest being extinguished by reason of limitation. E

Other than the issue of limitation, the defendant's affidavit-in-reply (encl 14) also raises many other issues ie:

- (1) the incorrectness of the plaintiff's statement of the sums outstanding as of the following dates: F
 - (i) 28 February 1993, ie the sum demanded by the plaintiff in Form 16D of the NLC 1965;
 - (ii) 2 August 1993, ie the date of filing of the originating summons;
 - (iii) 7 February 1994, ie sum alleged to be outstanding as averred to in para 2 of the plaintiff's supplementary affidavit affirmed on 16 December 1993 (encl 8); and G
- (b) non-receipt of the notice of demand issued by the plaintiff nor of any notification by the plaintiff of increment of interest from 4% to 12% a year. H

In the oral submissions before me counsel for the defendant limited her arguments only on the issue of limitation. In these circumstances the defendant is taken to have abandoned the other issues raised by the defendant's affidavit-in-reply.

Counsel for defendant submitted that the right of the plaintiff to recover the 'principal' sum was to be limited to the original sum of RM138,152 lent by the plaintiff. She concedes that the right to recover the I

- A original sum lent has not been extinguished as it was instituted within 12 years as prescribed in s 21(1) of the LA 1953.

With regard to the plaintiff's right to recover the arrears of interest however it was the defendant's case that it had been extinguished by reason of the fact that it was instituted after expiry of six years. According to counsel for the defendant, time commences from the earliest time at which an action could be brought. She submitted that the cause of action arose upon the failure of the defendant to effect payment of the first instalment, ie 21 November 1983 — the date the plaintiff's right was infringed. *Nadefinco Ltd v Kevin Corp Sdn Bhd* [1978] 2 MLJ 59 was relied on as authority for this proposition.

- C Alternatively, on the authority of *Sim Seok Eng v Kong Ming Bank Bhd* [1980] 2 MLJ 21 time runs from the issuance of the notice of demand dated 31 July 1985 whereby the total sum outstanding was claimed by the plaintiff.

- D Counsel for the defendant submitted on the facts of this case that the originating summons was filed only on 2 August 1993. Therefore, according to counsel for the defendant, computing time from 21 November 1983, there was a lapse of about nine years before the originating summons was filed; alternatively, computing time from 31 July 1985, there was a lapse of about eight years.

- E It was also the submission of counsel for the defendant that proviso (b) to s 21(5) of the LA 1953 was inapplicable. According to her there was no provision in the charge annexure whereby arrears of interest was to be treated as part of the principal sum of money secured by the charge and that interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

- F I have to determine what date the right to bring a foreclosure action first accrued to the bank. It may be appropriate to set out the provisions relating to limitation of actions to recover money secured by a charge. Section 21 of the LA 1953 reads as follows:

- G (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land ... or to enforce such mortgage or charge, or to recover proceeds of the sale of land ... after the expiration of 12 years from the date of when the right to receive the money accrued.
- (2) ...
- H (3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interests ... which has not matured or been determined.
- (4) ...
- I (5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge ... shall be brought after the expiration of six years from the date on which the interest became due:

Provided that—

(a) ...

(b) where the property subject to the mortgage or charge comprises any future interest ... and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum has accrued or is deemed to have accrued.

The bank contended that with regard to the claim for arrears of interest time runs for 12 years from the date of the demand, ie from 31 July 1985 and that the originating summons was filed within time. The defendant's argument was that the period applicable is six years — that time runs from the date of the default by the defendant of payment of the first instalment, ie 21 November 1983; alternatively, from 31 July 1985.

In this case I note that cl 4 of the charge annexure prescribes the circumstances upon which the whole sum together with interest has to be paid, which includes inter alia, upon default in payment of instalment or upon the defendant's resignation. Thereafter, cl 5 of the charge annexure clearly stipulates for a demand to be made for repayment.

In my judgment, at all events where there is a relationship between banker and customer and where there is an express term of the loan which provides that the money then due or thereafter to become due is to be made on demand, that means exactly what it says. As between customer and banker, it seems impossible for me to assume that the bank is entitled to sue on the very day of default or on the occurrence of the specified event without giving the customer a reasonable time to pay. In this case the agreement has provided quite clearly what is to be done before the bank can sue.

As to *Nadefinco Ltd v Kevin Corp Sdn Bhd* [1978] 2 MLJ 59 which was relied on by the defendant it is to be realized that that case was not directly on the question of the necessity for demand in the case of a fixed loan facility granted by a bank. That case is therefore to be distinguished from a case such as this where a customer owes money to a bank on a fixed loan facility and where he promises to pay the sum of money 'on demand'.

In considering whether such an 'on demand' provision made a demand an absolute necessity, *Chang Min Tat FJ* in the case of *Sim Sioh Eng v Kong Ming Bank Bhd* [1980] 2 MLJ 21 at p 22, in concluding that it is a question of ascertaining the intention of parties, made reference to the judgment of Atkin LJ in *N Joachimson (a firm name) v Swiss Bank Corp* [1921] 3 KB 110 which states:

The question appears to me to be in every case, did the parties in fact intend to make the demand a term of the contract? If they did, effect will be given to their contract, whether it be a direct promise to pay or a collateral promise, though in seeking to ascertain their intention, the nature of the contract may be material.

A On the facts of this case it was an express term of the contract that a demand be issued. Such an 'on demand' provision of the charge made a demand an absolute necessity and I hold that time therefore did not run against the plaintiff until a demand was made and repayment had been refused. In these circumstances I hold that the cause of action in this case arose from the date of issuance of the letter of demand, ie 31 July 1985.

B The next issue for me to determine is what is the limitation period applicable in respect of the claim for arrears of interest? Is it 12 years as contended by the plaintiff or is it six years as contended by the defendant?

C On this issue I observe that the charge executed in this case is as prescribed in statutory Form 16A of the NLC 1965, ie the form prescribed for a charge 'To secure payment of a *principal* sum.' (Emphasis is mine.) I also note from the charge executed that the defendant, as registered proprietor, covenanted to pay the chargee the sum of 'RM138,152 *dengan faedah*'. (Emphasis added.) It would therefore appear that the charge comprises future interest and by the express mention of the word 'faedah' (interest) in the charge in the form prescribed for payment of a 'principal' sum, interest was to be treated as part of the principal sum secured by the charge. There was furthermore the express provision of cl 10(c) of the charge annexure which provided that no payment made by the chargor shall be treated as repayment of principal until all interest due or deemed to be due or accrued has been paid.

E In these circumstances I hold that there were provisions in the charge and charge annexure whereby arrears of interest has to be treated as part of the principal sum of money secured by the charge and that interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued. In my judgment proviso (b) to s 21(5) of the LA 1953 applies and that the period applicable in this case is 12 years and not six years.

F To conclude on this issue, computing time from 31 July 1985 (the date of issuance of notice of demand) and noting that the originating summons was filed on 2 August 1993 there has been a lapse of only about eight years. The right of the plaintiff to recover the arrears of interest has therefore not been extinguished as it had been commenced within 12 years.

G It is also my finding that the defendant had not shown any reason, whether in law or in equity, why this court ought not to make an order for sale as prayed for by the plaintiff. The defendant is obliged to show 'cause to the contrary' for the purposes of s 256 of the NLC 1965. On the facts of this case all that I have before me is the suggestion that a person in default and who has not paid a single cent towards the acquisition of the said property is entitled to say in a foreclosure proceeding, 'You, the chargee, cannot apply your statutory right on this land because your right to recover the arrears has been extinguished'. Such a reason cannot in the light of my finding on the issue of limitation be accepted as 'cause to the contrary' within s 256 of the NLC 1965.

In all of the circumstances of this case I am of the view that the plaintiff is entitled to an order for sale and upon sale to receive that sum outstanding, including full arrears of interest, out of the proceeds of the sale of the land. A

The application of the plaintiff was accordingly allowed with costs and the date of public auction fixed on 7 September 1995. B

Application allowed.

Reported by Lew Chee Seong

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